

deterrent effect on others, were not the purposes of the legislation.

Moreover, proceedings under section 6 of the Act had to be commenced within two years of the company insolvency, except with leave of court. There was a clear statutory intention that the cases were taken to a conclusion quickly. It was hardly in accordance with that intention that, after they had been commenced they should be stayed against an individual who had not consented to that stay.

Having considered the charges against Mrs Kenning his Lordship said that even if she was to be regarded as a director of the company he was wholly unsatisfied that she conducted herself in a manner which made her unfit to be concerned in the management of a company.

Solicitor: Osborne Clarke.

Practice — power to dispense with service of copy order — power exercisable retrospectively

May 9, 1997

Court of Appeal

Davy International Ltd and Others v Tazzyman and Others Same v Durnig and Others

Before Lord Justice Leggatt, Lord Justice Morritt and Lord Justice Phillips

[Judgment May 1]

The power conferred on the High Court by Order 45, rule 7(7) of the Rules of the Supreme Court to dispense with service of a copy of an order under the rule if it thought it just to do so, was exercisable in respect of a mandatory order after the occurrence of events alleged to constitute a breach of that order, that is, retrospectively.

The Court of Appeal so held dismissing the appeal of the fourth defendant, VAI Industries (UK) Ltd and the first respondent, Herbert Durnig, from the judgment of Mr Justice May on March 10 when, inter alia, he dismissed their applications to strike out the notice of motion of the plaintiffs, Davy International Ltd, Davy Corporation Ltd and Trafalgar House Services Ltd, which sought, inter alia, orders for sequestration of the assets of VAI and the first respondent's committal to prison.

Mr Alan Boyle, QC and Mr Paul Gouling for VAI and the first respondent; Mr Mark Cran, QC, Mr Alistair McGregor, QC and Mr Nigel Porter for Davy.

LORD JUSTICE MORRITT said that Davy was granted in May 1996 an Anton Piller, search and seize, order in respect of VAI's office premises in Poole, Dorset. Parts of the order were mandatory requiring VAI to hand over listed documents, and parts prohibitory requiring it not to destroy certain documents.

The order did not have on its face the penal notice required by Order 45, rule 7(4). Davy alleged, inter alia, that documents were removed or destroyed, and that the affidavit sworn by the first respondent, a director of VAI and resident in Austria, was false in certain respects. They then issued their notice of motion which the judge refused to strike out.

The main point at issue was whether the court's power of dispensation of service, under Order 45, rule 7(7), was exercisable retrospectively or, as Mr Boyle contended, only prospectively, that is, before the expiration of the time limit for compliance with the particular order, the court being bound by *Lewis v Lewis* ([1991] 1 WLR 235) and *Denman v Temple* (unreported, May 9, 1991).

Mr Cran submitted the rule permitted retrospective as well as prospective dispensation, the court being bound by two earlier Court of Appeal decisions *Turner v Turner* ((1978) 122 Sol J 696) and *Hill Samuel & Co Ltd v Littaur* (*The Times* April 13, 1985).

His Lordship said that the wording of rule 7(7) was general. That pointed to the court's power not being confined in its operation to a particular time.

If it were not to be so construed, the court would be unable to deal with a party which was not served with the order during the period for compliance deliberately refusing to comply with an order made in its presence.

After considering the cases, his Lordship said that the *Turner* and *Hill Samuel* cases were binding on the court as establishing that rule 7(7) was not restricted to a prospective operation. It was established that the court was entitled to choose between conflicting authorities.

Those were the initial decisions and bound the later cases; they were not cited in the later cases and, if they had been, the courts would have been bound to reach the same conclusion; and they accorded with the proper construction of rule 7(7) in its context.

Lord Justice Phillips and Lord Justice Leggatt agreed.

Solicitors: Travers Smith Braithwaite; Linklaters & Paines.

Lloyd's litigation — case management — time for commencing proceedings

May 9, 1997

Queen's Bench Division

Phillips v Society of Lloyd's

In the interests of case management, Lloyd's names in dispute over acceptance of its reconstruction and renewal package should commence proceedings no later than May 16 to enable them to participate in *Society of Lloyd's v Colfox and Others* in the Commercial Court of the Queen's Bench Division (1997 Folio 131) and *Phillips v Society of Lloyd's* which were due to come before the court in the second half of June.

Mr Justice Colman so indicated in the Commercial Court on April 18 ordering that proceedings brought against Lloyd's by Timothy David Phillips be heard simultaneously with *Lloyd's v Colfox*.

HIS LORDSHIP said any other proceedings arising out of disputes between Lloyd's and other names not covered by those proceedings as to acceptance of reconstruction and renewal, or the consequences of acceptance of the package, including applications by Lloyd's for judgment under Order 14 of the Rules of the Supreme Court ought to be determined at the same time as the *Colfox* and *Phillips* proceedings. He said provided such other proceedings were commenced by

May 16 the court would facilitate their being heard at the same time as the *Colfox and Phillips* proceedings.

His Lordship directed provisionally that during the week of June 9 any further summonses relating to the conduct of further proceedings should be heard by the court and directions could then be given to ensure that all matters between all parties concerned and in dispute over acceptance of reconstruction and renewal be decided at the same time in June.

Medical treatment — negligence claim — duty of expert witness

May 9, 1997

Queen's Bench Division

Sharpe v Southend Health Authority and Another

Although an expert witness in a medical negligence case might have acted differently from a medical practitioner, he should make it clear whether the defendant acted in accordance with a practice accepted as proper by a responsible body of practitioners skilled in the relevant field.

Mr Justice Cresswell so held in a reserved judgment in the Queen's Bench Division on April 25, when dismissing the claim of Tyrone Sharpe for negligence against the first defendant, Southend Health Authority, who were responsible for the Southend General Hospital.

The plaintiff's negligence claim against the second defendant, Bloomsbury and Islington Health Authority, who were responsible for University College Hospital, London, was withdrawn in the closing speech of the plaintiff's counsel.

HIS LORDSHIP said that a court might prefer one body of opinion to another but that was no basis for a finding of negligence.

He added that an expert witness should make it clear in his or her report, if it were the case, that although the expert would have adopted a different approach or practice, that he or she accepted that the approach or practice adopted by the defendant was in accordance with the approach or practice accepted as proper by a responsible body of practitioners skilled in the relevant field.

Human rights — expulsion of drugs courier with fatal illness — inhuman or degrading treatment

May 12, 1997

European Court of Human Rights, Strasbourg

D v United Kingdom

(Case No 146/1996/767/964)

Before R. Ryssdal, President and Judges C. Russo, A. Spielmann, J. De Meyer, Sir John Freeland, A.B. Baka, P. Küris, U. Löhmus and J. Casadevall

Registrar H. Petzold

Deputy Registrar P. J. Mahoney

[Judgment May 2]

Removing a convicted drug courier in the advanced stages of Aids to his country of origin, St Kitts, would expose him to inhuman or degrading treatment in breach of article 3 of the European Convention on Human Rights and Fundamental Freedoms.

The applicant, D, was born in St Kitts and appeared to have lived there most of his life. He arrived at Gatwick Airport, London, on January 21, 1993.

He was refused leave to enter and issued with a removal order, having been found on arrival to be in possession of a substantial quantity of cocaine with a street value of about £120,000.

However, rather than being removed he was arrested and charged with illegally importing a controlled drug into the United Kingdom. He was convicted by a London court in April 1993 and sentenced to six years imprisonment.

In August 1994 the applicant was diagnosed while in prison as HIV positive and suffering from Aids. The infection appeared to have been contracted some time before his arrival in the United Kingdom.

He began to receive treatment for the illness. His condition had gradually deteriorated and he was in the advanced stages of the disease.

A medical report dated June 13, 1996 indicated that his prognosis was very poor and that his life expectancy was limited to eight to twelve months on present treatment.

On January 20, 1996, a few days before his release on licence, the immigration authorities ordered his removal to St Kitts. On February 2, the applicant applied unsuccessfully to the High Court for judicial review of the Chief Immigration Officer's refusal to allow him to remain in the United Kingdom on compassionate grounds.

On February 15, the Court of Appeal dismissed his renewed application for leave to apply for judicial review of the decision on the ground that the immigration authorities had properly treated his request as an application for leave to enter.

As such, they were not required to take into account the official policy guidelines on Aids sufferers, which only concerned the taking of decisions or applications to remain in the United Kingdom.

The applicant was currently living in special sheltered accommodation for Aids patients provided by a UK charity and continued to receive medical treatment for his condition.